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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *ex rel.* L. B. BINION,
PETITIONER

v.

WILLIAM A. O'BRIEN, United States Marshal for the Eastern District of Pennsylvania

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

JOSEPH M. F. RYAN, JR.,
Acting Assistant Attorney General,

HAROLD H. GREENE,
DAVID RUBIN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

Achilli v. *United States*, 353 U.S. 373	3, 4
Anderson v. *Corall*, 263 U.S. 193	6
Bounds v. *United States*, 262 F.2d 876	7
Lehmann v. *Acheson*, 206 F.2d 592	7
Simpson v. *United States*, 261 F.2d 497, certiorari denied, 359 U.S. 944	7
United States v. *United States Gypsum Co.*, 333 U.S. 364	6, 7

Statutes:

26 U.S.C. (1946 ed.) 145(b)	2, 3
26 U.S.C. (1952 ed.) 3616(a)	3
28 U.S.C. (1952 ed.) 2255	3

Miscellaneous:

F.R. Civ. P., Rule 52(a)	2, 5
5 Moore, *Federal Practice* (2d ed. 1951) 52.03 [2]	6, 7

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OPINIONS BELOW

The opinion of the District Court is not reported. The opinion of the Court of Appeals (Pet. 17-22) is reported at 273 F. 2d 495.

JURISDICTION

The judgment of the Court of Appeals (Pet. 23) was entered on December 9, 1959. A timely petition for rehearing was denied on January 28, 1960 (Pet.

24). The petition for certiorari was filed on April 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether this case involves any question of an appellate court setting aside findings of fact by a trial court, and, if so, whether this was properly done in the circumstances of this case.

RULE INVOLVED

Federal Rules of Civil Procedure, Rule 52. *Findings by the Court*

> (a) *Effect.* * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. * * *

STATEMENT

On September 3, 1952, the petitioner entered a plea of *nolo contendere* in the District Court for the District of Nevada to an indictment charging him with evasion of his income tax for the year 1949 in violation of 26 U.S.C. (1946 ed.) §145(b) (26a).[1] He was sentenced to pay a fine and was placed on probation for a period of five years from September 3, 1952, to September 3, 1957 (26a). The probation was conditioned upon the petitioner's reporting every sixty days to the federal probation officer (27a).

Thereafter, on December 14, 1953, the petitioner pleaded guilty in the District Court for the Western

[1] References suffixed "a" are to the Appendix filed in the court below.

District of Texas to two indictments charging income tax evasion for the years 1947 and 1948 in violation of 26 U.S.C. (1946 ed.) 145(b) (26a). He was sentenced to pay a fine of $20,000 and to three prison terms of five years each, to run concurrently, followed by probation for three years (25a, 26a). Service of the sentences commenced immediately (26a).

After serving more than two and one-half years on the Texas sentence in the United States Penitentiary at Leavenworth, Kansas, the petitioner filed a motion for correction of his Texas sentence pursuant to 28 U.S.C. (1952 ed.) 2255, on the ground that 26 U.S.C. (1952 ed.) 3616(a) applied to his offenses, and that under that section the sentences imposed should not have exceeded one year (31a). This motion was denied, and the denial was appealed to the Court of Appeals for the Fifth Circuit (31a). Action on the appeal was deferred on September 22, 1956, pending the decision of this Court in *Achilli* v. *United States*, 353 U.S. 373 (31a). On March 11, 1957, this Court admitted the petitioner to bail pending disposition of the *Achilli* case, upon a bond in the sum of $25,000 (31a). On March 19, 1957, the petitioner was released on bond (31a). At the time of his release, he had three months and twenty days remaining to serve on the Texas sentence in order to be eligible for mandatory release (31a).

On March 21, 1957, the petitioner reported to the Chief United States Probation Officer in Las Vegas, Nevada, and continued to report to him until ordered back to the penitentiary (32a). As has been previously noted, the Nevada probation order required him to report to the probation officer every sixty

days from September 3, 1952, until September 3, 1957. While petitioner was free on bail, however, the probation officer, in addition to requiring the petitioner to comply with the conditions of probation imposed by the Nevada sentence, required him to report by personal contact not less than once a week (27a), and petitioner complied with this requirement (27a). On May 27, 1957, this Court handed down its decision in *Achilli* v. *United States*, 353 U.S. 373, and in accordance therewith the Court of Appeals affirmed the District Court's denial of the motion to correct the petitioner's sentence, 245 F. 2d 466 (C.A. 5). The petitioner then filed a petition for writ of certiorari, which was denied on October 14, 1957. 355 U.S. 834. Two days later he surrendered to the United States Marshal at Philadelphia (28a). On the same day, however, he filed a petition for a writ of habeas corpus, and on October 17, 1957, he was released on $5,000 bail pending decision on the petition (28a, 32a).

After hearing, the District Court found that the Nevada probation officer had required the petitioner to report in the same manner as a parolee from March 19, 1957, to October 23, 1957, a period exceeding the three months and eighteen days remaining to be served on his Texas prison sentence (33a).[2]

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[2] The petitioner spent two days in jail in Philadelphia on October 16 and 17, 1957, after he surrendered to the United States Marshal. This reduced the time remaining to be served on the Texas sentence from three months and twenty days to three months and eighteen days.

Concluding that parole is ameliorated imprisonment, the court held that the petitioner had earned confinement time during the entire period from March 19, 1957, to October 23, 1957, and was entitled to his release. Accordingly, the petition for a writ of habeas corpus was granted (33a-35a).

The Court of Appeals for the Third Circuit reversed, holding that the petitioner was not entitled to credit towards the Texas prison sentence for his extra reporting during the period from March 19, 1957, through September 3, 1957, when he was validly required to report, albeit less frequently, pursuant to the terms of the Nevada probation order. Accordingly, the Court of Appeals ruled that the petitioner was entitled to credit only for his reporting during the period from September 3, 1957, through October 23, 1957, when he had no independent duty to report under the Nevada probation sentence (Pet., pp. 20-21).

ARGUMENT

The petitioner bases his petition in this Court exclusively upon the proposition that a division of authority exists among the Courts of Appeals as to whether the "clearly erroneous" test of Rule 52(a), F. R. Civ. P., applies to the review by a Court of Appeals of District Court findings of fact based entirely on documentary evidence, and he requests that this conflict should be resolved in this case. In his view, the Court of Appeals in this case set aside a District Court finding of fact without confining its scope of review to the limits of the "clearly erroneous" test of Rule 52(a).

The flaw in the petitioner's position is that the Court of Appeals did not overturn any District Court finding of fact. The decision of the Court of Appeals was one of law, not of fact. The Court of Appeals decided merely that one who is released on bail, and who is already under a duty to report to a probation officer pursuant to a prior sentence, does not earn credit towards his prison sentence if his probation officer requires him to report more frequently than is required by the probation order. Recognizing that a person under no duty to report at all would be subjected to ameliorated imprisonment if required to report, see *Anderson* v. *Corall*, 263 U.S. 193, the Court of Appeals ruled that such status does not attach to one who is already under a duty to report, but is required to report with greater frequency than the scope of the prior duty commands. As the Court of Appeals held (Pet., p. 20):

> Since he had a duty to report under the Nevada probation order until September 3, 1957, he cannot be given credit on his later sentence for reporting done prior to that date. The frequency of the reporting during this period does not create a different status as does a requirement to report where there is no duty to report at all.

It is settled that the "clearly erroneous" doctrine applies only to appellate review of findings of *fact*. It does not apply to the District Court's conclusions of law, *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394; 5 Moore, *Federal Practice* (2d ed. 1951) 52.03[2], to determinations upon mixed questions of law and fact, *United States* v. *United*

States Gypsum Co., 333 U.S. 364, 396; *Bounds* v. *United States*, 262 F. 2d 876 (C.A. 4); *Simpson* v. *United States*, 261 F. 2d 497 (C.A. 7), certiorari denied, 359 U.S. 944; 5 Moore, *Federal Practice* (2d ed. 1951) 52.03[2], nor to a finding "in the nature of an ultimate finding of fact" or "a legal inference". *Lehmann* v. *Acheson*, 206 F. 2d 592, 594 (C.A. 3). At the very least, the determination of the Court of Appeals was upon a mixed question of law and fact, as to which it is settled that the "clearly erroneous" rule does not govern.

The petitioner's theory rests upon two fallacious premises: (1) that the District Court found, as a fact, that the probation officer had "imposed the unlawful restraint solely in connection with the prison sentence," and (2) that the Court of Appeals "found as a fact that the unlawful restraint which occurred prior to September 3 derived from both sentences, the prison sentence and the probation sentence", and then went on to rule that such restraint must be allocated entirely to the probation sentence (Pet., p. 13).

The District Court did not make any finding of fact that the probation officer had "imposed the unlawful restraint solely in connection with the prison sentence". Not only is there no formal finding to this effect, but also the opinion does not contain any language intimating such a finding. The District Court merely said that the probation officer required the petitioner to report in the same manner as a parolee from March 19, 1957, to October 23, 1957.[3]

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[3] See pages 32a and 33a of the Appendix filed in the court below.

As to the *reasons* for the probation officer's decision, the District Court's opinion is silent.

The Court of Appeals did not make any "finding" that the restraint occurring prior to September 3 "derived" from both sentences. As has been shown, the decision of the Court of Appeals was based upon its legal conclusion that the increased frequency of the reporting did not result in a new status of ameliorated imprisonment so as to entitle petitioner to credit towards his prison sentence. The Court of Appeals did not, expressly or otherwise, overturn a District Court finding of fact.[4]

[4] Significantly, the petitioner, after suggesting, without referring to any specific language, that the Court of Appeals found that the restraint which occurred prior to September 3 must be allocated entirely to the probation sentence, goes on to say that "Conceivably [this finding] is in the nature of a conclusion of law" (Pet., p. 13).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

JOSEPH M. F. RYAN, JR.,
Acting Assistant Attorney General.

HAROLD H. GREENE,
DAVID RUBIN,
Attorneys.

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